

First Comes Love, Then Comes Marriage? Applying Washington's Community Property Marriage Statutes to Cohabital Relationships

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I. INTRODUCTION

"First comes love, then comes marriage," Not necessarily. This old jump rope chant may now have a new twist: "First comes love, then comes cohabitation." And why not? After all, this is the '90s. For many couples, marriage is no longer the only option when considering life together. What is marriage anyway but a piece of paper from the state, or a blessing from a religious institution from which many have either grown away or with which many had no connection at all? As society's views of cohabitation have changed, so have the ways that Washington courts treat property held by couples in cohabital relationships.¹

To understand the significance of these changes, it is important to analyze the treatment of marital property² under Washington's

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1. As used in this Comment, "cohabital" shall refer to a family-like nonmarital relationship between a man and a woman. The term "meretricious" will only be used in this Comment when quoted in authority. Most recent cases contain a footnote recognizing that the term "meretricious" is a historically demeaning and sexist term derived from the Latin word "meretrix," meaning "prostitute." However, with apologies, these cases continue to use the word because it has been given a legally recognizable definition over time. Not finding this reasoning particularly compelling for the use of such a derogatory term, and because this is not a court opinion, I will instead use the term "cohabital" to refer to what has been referred to as "meretricious." It is interesting to note that many of the same issues that arise in cohabital relationships may also arise in same-sex relationships; however, that is not the focus of this Comment.

2. Although a common law marriage may not be created in Washington, if a common law marriage is created elsewhere, Washington will recognize it as a valid marriage. *In re Gallagher's Estate*, 35 Wash. 2d 512, 213 P.2d 621 (1950). Because an out-of-state common law marriage is viewed as a valid legal marriage in Washington, this type of relationship shall be treated the same as marriage in this Comment.

community property law. Generally, community property law provides that when a man and a woman marry, they are treated as a type of partnership.³ Equality forms the basis of this legal relationship: All wealth acquired by either spouse during the marriage is shared due to the presumption that each spouse contributed to the prosperity of the marriage. It naturally follows that each spouse acquires an equal right to the property after the community (partnership) terminates.⁴

In promoting the general principle of equality, Washington law recognizes certain rules and presumptions. For instance, property acquired during marriage is presumed to be community property.⁵ When separate property is commingled with community property, it becomes community property; when one spouse incurs an obligation, the community is presumed obligated.⁶ Also, agreements that disaffirm community property are subject to a higher standard of proof than those that affirm community property.⁷ Although most married couples do not know the particulars of these rules and presumptions, they do know that saying "I do" will subject their property to a panoply of statutory rules upon death or dissolution.

Unlike married couples, until recently, cohabitants could not expect Washington courts to apply the rules and presumptions found in community property statutes.⁸ In fact, courts historically refused to apply any special considerations to cohabitants at all. This view was embodied by a rule of law that reigned for over thirty-six years: the "Creasman presumption."⁹ This presumption held that, absent any evidence to the contrary, the way property was titled at the end of a cohabitational relationship was presumed to be the way the parties intended.¹⁰

However, beginning with the 1984 case of *In re Marriage of Lindsey*,¹¹ the distinction between courts' treatment of marriage and cohabitation began to blur. With *Lindsey*, the Washington Supreme

3. Harry M. Cross, *The Community Property Law In Washington*, 61 WASH. L. REV. 13, 18 (1986).

4. *Id.* at 18 n.7.

5. WASH. REV. CODE § 26.16.030 (West 1996).

6. *Id.*

7. Cross, *supra* note 3, at 19.

8. *Poole v. Schrichte*, 39 Wash. 2d 558, 236 P.2d 1044 (1951). See also *In re Sloan's Estate*, 50 Wash. 86, 90, 96 P. 684, 685 (1908); WASHINGTON STATE BAR ASS'N, WASHINGTON COMMUNITY PROPERTY DESKBOOK § 2.60 (2d ed. 1989).

9. *Creasman v. Boyle*, 31 Wash. 2d 345, 355, 196 P.2d 835, 841 (1948).

10. *Id.*

11. 101 Wash. 2d 299, 678 P.2d 328 (1984).

Court overruled the *Creasman* presumption.¹² In its place, the *Lindsey* court adopted a rule requiring a "just and equitable" disposition of cohabitational property based on the nature of the relationship and the nature of the property.¹³ This rule was derived from direct analogy to the "just and equitable" dissolution statute, Revised Code of Washington (RCW) 26.09.080, which lists the factors a court is instructed to use in dividing up a couple's property upon the dissolution of their marriage.¹⁴

Analogizing to the marriage statute for cohabitational relationships is neither wise nor necessary. Statutory analogy is not wise because the scope of the analogy is unclear and therefore can lead to ad hoc decisions and judicial legislation. In addition, statutory analogy is unnecessary because the courts had managed to "do equity" for cohabitating couples by using various equitable means to get around the *Creasman* presumption.

The Washington Supreme Court's most recent decision dealing with property distribution after cohabitation, *Connell v. Francisco*,¹⁵ demonstrates two problems of scope in applying the "just and equitable" statutory analogy. First, should a court refer to *all* of the "just and equitable" dissolution statute by considering both the "separate" and the "community" property of a cohabitational relationship when making a just and equitable distribution?¹⁶ Second, because the "just and equitable" dissolution statute is interdependent with other marital statutes,¹⁷ can it be meaningfully applied by analogy without also applying other marital statutes by analogy?

12. *Id.*

13. *Id.* at 304, 678 P.2d at 331.

14. *Id.* at 304, 678 P.2d at 332. WASH. REV. CODE § 26.09.080 (West 1996) provides in pertinent part:

In a proceeding for dissolution of the marriage . . . the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of the property is to become effective. . . .

Id.

15. 127 Wash. 2d 339, 898 P.2d 831 (1995).

16. See, e.g., *Connell v. Francisco*, 74 Wash. App. 306, 872 P.2d 1150 (1994); *Zion Constr., Inc. v. Gilmore*, 78 Wash. App. 87, 895 P.2d 864 (1995).

17. For example, the community property statutes, WASH. REV. CODE §§ 26.26.010-.030, contain the definitions of "separate" and "community" property.

Even if the problems with the scope of the "just and equitable" statutory analogy can be solved, such a solution is not necessary because of the continuing availability of the equitable means that were used prior to *Lindsey*. Both *Lindsey* and *Connell* gave the *Creasman* presumption more credit as a nemesis than it deserved. The *Creasman* presumption was an ineffectual vestige of a bygone time. The last time the *Creasman* presumption was applied was in the *Creasman* case itself. Virtually every appellate or Supreme Court case between *Creasman* and *Lindsey* dealing with the distribution of property after a cohabitational relationship cited *Creasman* almost by rote, and then found that the presumption did not apply.¹⁸ Instead, the courts used various equitable means to get around *Creasman*.

Because *Creasman* was not used, the *Lindsey* court's overruling of *Creasman* did not make property distributions after cohabitation any more equitable. *Lindsey's* analogy to the marriage statutes merely adds

18. See *Hinkle v. McColm*, 89 Wash. 2d 769, 770, 575 P.2d 711, 712 (1978) (not confronted with *Creasman* because court did not believe the relationship was "meretricious," but court did give the property as titled in accordance with equity and *Creasman*); *Latham v. Hennessey*, 87 Wash. 2d 550, 552, 554 P.2d 1057, 1058 (1976) (not within *Creasman* because evidence showed that parties intended title to be in decedent's name); *In re Estate of Thornton*, 81 Wash. 2d 72, 79, 499 P.2d 864, 867 (1972) (not within *Creasman* because there was evidence sufficient to make out a prima facie case for implied partnership); *Humphries v. Riveland*, 67 Wash. 2d 376, 386, 407 P.2d 967, 972 (1965) (not within *Creasman* because of evidence that the parties had discussed the possibility of titling the property in both their names, but because this was not done, it was evidence that they intended it to be titled as it was); *West v. Knowles*, 50 Wash. 2d 311, 313, 311 P.2d 689, 691 (1957) (not within *Creasman* because both parties were alive and testified as to their intent); *Iredell v. Iredell*, 49 Wash. 2d 627, 629-30, 305 P.2d 805, 807 (1957) (not within *Creasman* because there was evidence to a contrary intent of ownership); *Dahlgren v. Blomeen*, 49 Wash. 2d 47, 53-54, 298 P.2d 479, 482-83 (1956) (not within *Creasman* because there was a written agreement for consideration to will property); *Lalley v. Lalley*, 43 Wash. 2d 192, 195, 260 P.2d 905, 907 (1953) (not within *Creasman* because relationship was not considered "meretricious"); *Poole*, 39 Wash. 2d at 561-62, 236 P.2d at 1047 (not within *Creasman* because rights stemmed from joint venture or partnership relationship that was not altered by the cohabitational relationship); *Walberg v. Mattson*, 38 Wash. 2d 808, 813-14, 232 P.2d 827, 830 (1951) (not within *Creasman* because parties were alive and testimony showed intent); *Warden v. Warden*, 36 Wash. App. 693, 695, 676 P.2d 1037, 1037, *rev. denied*, 101 Wash. 2d 1016 (1984) (case decided the same time as *Lindsey*; rejects *Creasman* and decides based on just and equitable standards); *DeLaGarza v. Rennebohm*, 24 Wash. App. 575, 577, 602 P.2d 372, 373 (1979) (*Creasman* presumption cited, but not central to issue of case, which was whether a change of venue from the county in which property was located was appropriate in a dissolution of a "meretricious relationship and/or common-law marriage" action); *Adams v. Jensen-Thomas*, 18 Wash. App. 757, 761-62, 571 P.2d 958, 961-62 (1977) (not within *Creasman* because relationship was not "meretricious" because man was still living with his wife); *Omer v. Omer*, 11 Wash. App. 386, 392, 523 P.2d 957, 960-61 (1974) (not within *Creasman* because the court held there was a constructive trust); *Proctor v. Forsythe*, 4 Wash. App. 238, 240, 480 P.2d 511, 513 (1971) (not within *Creasman* because relationship was not "meretricious" because man was still living with his wife). But see *In re Marriage of Rhoads*, 645 P.2d 1153, 1154 (Wash. Ct. App. 1982) (court said *Creasman* applied, but logic of the case does not show that court really used *Creasman*).

another layer of complication to an area of law that had functioned quite well using equitable means to avoid the *Creasman* presumption. *Connell* demonstrates that statutory analogy will lead to more unpredictability as courts attempt to determine the exact scope of that analogy. The "exceptions" to the *Creasman* presumption should be the rule to ensure the flexibility required by equity in these types of cases, while keeping distinct the lines between marriage and cohabitation.

To promote this thesis, Part II discusses the facts of *Creasman* and then dispels the myth of importance surrounding its presumption. Part III reviews the facts of *Lindsey*, looks at whether cohabitation and marriage can ever be analogous, then attempts to identify trends and find predictability in the cases between *Lindsey* and *Connell*. Part IV summarizes the facts of *Connell* and concludes that statutory analogy produces no better results than existing equitable doctrines, while leading to much greater unpredictability. Finally, Part V argues that the *Creasman* "exceptions" offer an equitable and more predictable way of distributing cohabitational property in a manner that meets the expectations of the cohabitants without infringing upon the legal relationship of marriage.

II. CREASMAN: THE PRESUMPTION THAT WASN'T

From 1939 until her death in 1946, Caroline Paul and Harvey Creasman cohabitated as "husband" and "wife." Caroline was Caucasian and Harvey was African-American. During Caroline and Harvey's cohabitation, Caroline, in her name only, contracted to purchase land occupied by a dilapidated shack and established a bank account. Harvey's wages from his work in the Bremerton Navy Yard provided for the couple's living needs, including payments on the real estate contract, home improvements, and the purchase of savings bonds. Caroline maintained the home and managed the money (generally in her name), thus allowing the couple's assets to grow. When Caroline died, Harvey claimed entitlement to the home, household goods, and savings account. The trial court awarded half of the claimed property to Harvey and half to Caroline's estate. Both Harvey's and Caroline's administrators appealed.¹⁹

On appeal, the Washington Supreme Court cited the rule that, in the absence of a trust relationship, property acquired by parties during cohabitation belonged to the party in whom the legal title stood.²⁰

19. *Creasman*, 31 Wash. 2d at 350-51, 196 P.2d at 836-37.

20. *Id.* at 351, 196 P.2d at 838 (citing *Engstrom v. Peterson*, 107 Wash. 523, 530, 182 P. 623, 625 (1919); *Hynes v. Hynes*, 28 Wash. 2d 660, 671, 184 P.2d 68, 74 (1947)).

The court then rejected Harvey's resulting trust theory,²¹ concluding that the property was titled as the parties had intended.²² In terms reflective of the moral climate of the day, the court stated that "[t]he contract between them, if any there was, . . . was simply an agreement or arrangement for a protracted illicit cohabitation, originated in premeditation and carried out in accordance with their deliberate choice and design."²³ Further, the court stated that the case was illustrative of a situation "where this court can, and should, declare that it will leave the parties exactly where it finds them with respect to their property. . . ."²⁴

These comments, and the rejection of the resulting trust theory, led the court to declare the *Creasman* presumption: "[U]nder these circumstances and in the absence of any evidence to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it."²⁵

The *Creasman* presumption ostensibly ruled for thirty-six years until overruled by *Lindsey*. It is possible that the *Creasman* presumption was used at the trial court level to decide cohabitational property disputes with cool efficiency. At the appellate and Supreme Court levels, however, this did not occur. In only one appellate case, *In re Marriage of Rhoads*,²⁶ did the court claim to base its holding on the *Creasman* presumption, but that court's stated reliance on the presumption was questionable.²⁷ In other cases between *Creasman*

21. *Creasman*, 31 Wash. 2d at 354-55, 196 P.2d at 839-40. Harvey asserted that because the property was paid for with his earnings but held in Caroline's name, Caroline was merely holding legal title subject to his equitable ownership. In a resulting trust, the consideration for the purchase of the property is made solely by the equitable owner and the party with legal title must have no beneficial interest in the property. *Scott v. Currie*, 7 Wash. 2d 301, 307, 109 P.2d 526, 529 (1941). The *Creasman* court stated that the founding principle of a resulting trust is the parties' presumed intention to create a trust, and the facts and circumstances here reasonably indicated no such intention, but rather a contrary intention. This conclusion was buttressed by the fact that Harvey and Caroline were "considerably more than 'domestic strangers' to each other." They had held themselves out as husband and wife and had acquired the property with full knowledge that they were not married; therefore, the court inferred that they had been deliberate in the titling of the property. Further, Caroline had contributed to the acquired property by her domestic efforts and had enjoyed the use of the property; she thus had a beneficial interest in the property and the property ownership did not fit the resulting trust model. *Creasman*, 31 Wash. 2d at 352-57, 196 P.2d at 839-41.

22. *Id.* at 355, 196 P.2d at 841.

23. *Id.* at 353, 196 P.2d at 839.

24. *Id.*

25. *Id.* at 355, 196 P.2d at 841.

26. 645 P.2d 1153 (Wash. Ct. App. 1982).

27. The *Rhoads* case dealt primarily with the distribution of a residence in a divorce action, which was purchased by the husband prior to marriage while the parties were living together. Although the court cited *Creasman* as the rule, it then went on to affirm the trial court's finding

and *Lindsey*, courts cited the *Creasman* presumption, but then found that it did not apply and instead based their holdings on various other reasons, including, inter alia, resulting trust, constructive trust, joint venture, implied partnership, tracing, joint tenancy, express and implied contract, and clear evidence of the intent of the parties.²⁸ Some courts also found that the relationship did not qualify as "meretricious."²⁹

An example of how the Washington Supreme Court used one of the "*Creasman* exceptions"³⁰ is found in *In re Estate of Thornton*.³¹ In that case, when a sixteen-year cohabitational relationship ended by the death of the male cohabitant, the court found the evidence sufficient to make out a prima facie case of implied partnership.³² Implied partnership depends on the intention of the parties as ascertained from all facts, circumstances, actions and conduct of the parties.³³ The couple in *Thornton* had engaged in a cattle ranching enterprise on real estate owned by the man. The female cohabitant had contributed to the success of the business venture. In that case,

of fact that the residence was the husband's separate property for reasons unrelated to the *Creasman* presumption. Those reasons included the fact that the woman had very little involvement in the decision to purchase the home and that the man made the down payment with his separate funds and paid off the loan on the property with his salary prior to marriage. The man had borrowed \$2,000 from the woman's separate funds to make some of those payments, but he had repaid her prior to their marriage. *Id.* at 1154.

28. See, e.g., *Walberg*, 38 Wash. 2d at 813, 232 P.2d at 830-31 (finding resulting trust); *Omer*, 11 Wash. App. at 393, 523 P.2d at 961 (finding constructive trust); *Poole*, 39 Wash. 2d at 565, 236 P.2d at 1049 (finding joint venture); *Thornton*, 81 Wash. 2d at 75, 499 P.2d at 865-66 (finding implied partnership); *West*, 50 Wash. 2d at 313, 311 P.2d at 691 (applying tracing to determine property ownership because both parties were alive and testified as to their intent); *Shull*, 63 Wash. 2d at 504, 387 P.2d at 768; *Dahlgren*, 49 Wash. 2d at 54, 298 P.2d at 483; *Latham*, 87 Wash. 2d at 553, 554 P.2d at 1059.

29. E.g., *Proctor*, 4 Wash. App. at 240, 480 P.2d at 513. See also *In re Relationship of Eggers*, 30 Wash. App. 867, 873, 638 P.2d 1267, 1271 (1982); *Adams*, 18 Wash. App. at 762, 571 P.2d at 961-62. A "meretricious" relationship was defined in *Latham* as a long-term, stable, nonmarital family relationship. 87 Wash. 2d at 554, 554 P.2d at 1059. The relevant factors for the court to use in ascertaining whether a long-term, stable, nonmarital family relationship exists are: (1) continuous cohabitation, (2) duration of the relationship, (3) purpose of the relationship, and (4) the pooling of resources and services for joint projects. *Id.* If a "meretricious" relationship is found, then it is reasonable for the court to assume that each member in some way contributed to the acquisition of the property. *Id.*

30. *Latham*, 87 Wash. 2d at 553-54, 554 P.2d at 1059. The *Adams* court pointed out that the word "exception" is confusing because the *Creasman* presumption was not conclusive, but rebuttable by a preponderance of the evidence, whereas an exception is required only to circumvent a conclusive presumption. 18 Wash. App. at 761 n.5, 571 P.2d at 960 n.5. At the risk of technical imprecision, this Comment will refer to the "*Creasman* exceptions" when discussing the equitable means used to avoid the *Creasman* presumption.

31. 81 Wash. 2d 72, 499 P.2d 864 (1972).

32. *Id.* at 80, 499 P.2d at 868.

33. *Id.* at 79, 499 P.2d at 867-68.

the court was able to provide a remedy for the woman, where the *Creasman* presumption would have precluded the woman from claiming anything from the man's estate.

Thornton, and the numerous other cases using the *Creasman* exceptions, show that the *Creasman* presumption carried little substance at the appellate and Supreme Court levels. But there may have been other reasons favoring *Creasman*'s rejection. By *Lindsey*, *Creasman* was criticized for relying on unacknowledged facts: in particular, Caroline and Harvey were a racially mixed couple living together in the 1940s.³⁴ Further, if the *Creasman* presumption was used at the trial court level on cases that were not appealed for any number of reasons (e.g., cost or social stigma), that use could have added significantly to the presumption's poor reputation. It is no wonder that, by *Lindsey*, *Creasman* was perceived as a harsh, old-fashioned rule that could be altered only by a drastic change in the law.

III. LINDSEY AND STATUTORY ANALOGY

Aside from whether *Lindsey*'s overruling of *Creasman* was necessary, the fact remains that *Lindsey* changed the law in Washington. Courts now must look at the property of the cohabitants and the nature of the relationship to make a "just and equitable" distribution of cohabitational property. On its face, *Lindsey*'s dictates appear reasonable, and statutory analogy appears to be the cure for the perceived harshness of the *Creasman* presumption. However, when the *Lindsey* rationale is fully analyzed and the public policy issues explored, *Lindsey* has not improved this area of the law because the scope of *Lindsey*'s statutory analogy is not clear. Statutory analogy is therefore unpredictable. Further, *Lindsey*'s statutory analogy should lead us to conclude that the court has overstepped its bounds by performing the task of deciding society's values regarding cohabitation.

This Part familiarizes the reader with why the *Lindsey* court adopted a rule analogous to the "just and equitable" dissolution statute. This Part then addresses the public policy issue of whether statutory analogy of cohabitation to marriage is desirable or workable, with the aim of stimulating some "big-picture" thinking before beginning the more detail-oriented discussion of how *Lindsey* has been interpreted. Finally, it attempts to find guidance as to *Lindsey*'s scope in the cases

34. See, e.g., *West*, 50 Wash. 2d at 318-19, 311 P.2d at 693-94 (citing a Texas law review article which criticized *Creasman*'s result as racist and sexist); *Thornton*, 81 Wash. 2d at 77-78, 499 P.2d at 866-67 (implying that *Creasman* reflected the court's perception of the moral status of cohabitation).

between *Lindsey* and *Connell*. From this endeavor, the theory is posed that courts are actually using the *Creasman* exceptions and are simply labeling this use as statutory analogy.

A. *In re Marriage of Lindsey*

1. Facts and Holding of *Lindsey*

By 1984, the Washington Supreme Court was ready to overrule *Creasman*³⁵ and the court believed *In re Marriage of Lindsey* was just the case to do this.³⁶ *Lindsey* involved a dissolution action between Lana and Carl Lindsey. Prior to their five-year marriage, Lana and Carl lived together for two years. Primarily at issue was the distribution of approximately \$85,000 in fire insurance proceeds received when a barn/shop burned down. The barn was built by the couple during their cohabitation.

After performing a "just and equitable" division of the community assets acquired during marriage, the trial court discussed what should be done with the assets acquired during the couple's cohabitational relationship. Applying the *Creasman* presumption, the trial court awarded Carl, inter alia, all of the fire insurance proceeds. Lana appealed, claiming the trial court erred by applying *Creasman*.

On appeal, the *Lindsey* court expressly overruled the *Creasman* presumption, stating that the rule in application had been restricted to the facts of *Creasman*.³⁷ Further, the court recognized that many methods had been used to avoid application of the *Creasman* presumption.³⁸ The court then concluded that *Creasman* had been expanded beyond its intended scope (those facts just like *Creasman*), and its "constricting dictates . . . have made the law unpredictable and at times onerous."³⁹

In *Creasman*'s place, the *Lindsey* court stated the current rule that "courts must 'examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.'"⁴⁰ Facially, this language easily could be read as a validation of the *Creasman* "exceptions" as the new rule. However, the

35. See *Thornton*, 81 Wash. 2d at 77-78, 499 P.2d at 867. See also *Latham*, 87 Wash. 2d at 553-54, 554 P.2d at 1060. In dicta, the court questioned the *Creasman* presumption's application to facts other than that of *Creasman* and noted that *Thornton* had been dubious about the continuing validity of the presumption. *Id.*

36. *Lindsey*, 101 Wash. 2d at 304, 678 P.2d at 331.

37. *Id.* at 302, 678 P.2d at 330.

38. *Id.* at 303-04, 678 P.2d at 330-31.

39. *Id.* at 304, 678 P.2d at 331.

40. *Id.* (quoting *Latham*, 87 Wash. 2d at 554, 554 P.2d at 1059).

citations following the above-quoted rule support the conclusion that *Lindsey* intended to analogize to the "just and equitable" dissolution statute. Specifically, the *Lindsey* court cited directly to the dissolution statute following the stated rule by writing "*Cf. RCW 26.09.080.*"⁴¹ "*Cf.*" means: "Cited authority supports a proposition *different from the main proposition but sufficiently analogous to lend support.*"⁴² Further support that the *Lindsey* court intended to analogize to the "just and equitable" dissolution statute is found in the wording of the *Lindsey* rule itself, which parallels the wording of RCW 26.09.080.⁴³ Despite this evidence that *Lindsey* intended that property distributions following cohabitational relationships should be dealt with in terms that are analogous to the "just and equitable" dissolution statute, *Lindsey* offered no guidance as to whether both "separate" and "community" cohabitational property should be considered, or whether other marital statutes should also be applied by analogy.

2. What was *Lindsey* Trying to Accomplish?

In essence, the *Lindsey* court overruled *Creasman* because it found "the constricting dictates of the *Creasman* presumption to have made the law *unpredictable* and at times *onerous*."⁴⁴ It may be inferred that the *Lindsey* court was concerned that any rule for the distribution of cohabitational property should be *predictable* and *equitable*.

Lindsey's concern with equity was that the law in this area not be onerous.⁴⁵ Something is said to be "onerous" when "the obligations attaching to it unreasonably counterbalance or exceed the advantage to be derived from it Unreasonably burdensome or one-sided."⁴⁶ Equity seems to be the antithesis of onerousness. The adoption of the "just and equitable" approach ostensibly fits with *Lindsey's* goal of eliminating *Creasman's* perceived harsh, onerous results. However, considering that *Creasman* was probably only applied in unappealed trial court cases, and considering the equitable nature of the *Creasman* exceptions, there were, in theory, no harsh, onerous results to eliminate. If the *Lindsey* court's goal was to alleviate harsh results at the trial court level, this intent was not made clear. Nor does *Lindsey* seem to take into account the *Creasman* exceptions.

41. *Id.* at 304, 678 P.2d at 331.

42. HARVARD LAW REVIEW ASS'N, A UNIFORM SYSTEM OF CITATION 23 (16th ed. 1996) (emphasis added).

43. See *supra* note 14 for text of WASH. REV. CODE § 26.09.080.

44. *Lindsey*, 101 Wash. 2d at 304, 678 P.2d at 331 (emphasis added).

45. *Id.*

46. BLACK'S LAW DICTIONARY 1088 (6th ed. 1990).

As to the *Lindsey* court's conclusion that *Creasman* made the law unpredictable, if one accepts the *Lindsey* court's assertion that *Creasman* may be limited to its facts, then it follows that *Creasman* could not make the entire law regarding disposition of property after cohabitational relationships unpredictable. Assuming *arguendo* that the *Creasman* presumption only applies to those cases involving cohabitational relationships ended by death,⁴⁷ the *Creasman* presumption is easy to apply and is very predictable. Increasing this predictability is the fact that a party can count on the presumption not being applied at the appellate and supreme court levels, as established in Part II of this Comment.

In contrast, *Lindsey's* statutory analogy creates unpredictability because it only applies to those cohabitational relationships that are deemed "stable, continuous family-type relationships."⁴⁸ This unpredictability is created in two ways. First, no bright-line rule exists for determining when a relationship is a "stable, continuous family-type relationship." Instead, that determination is dependent on a rather indeterminate "factor" test. Second, once a relationship is deemed a "stable, continuing family-type relationship," there is no indication as to whether this designation is retroactive to the day the couple moved in together, or even to the time when they may have first started spending nights together.

It is extremely questionable whether *Lindsey's* statutory analogy did anything to improve predictability in cohabitation cases. On the contrary, as *Connell* later demonstrated, the courts are now forced to determine which portions of the marriage statutes will apply and which portions will not. Further, the courts are left to determine how the equitable doctrines used as exceptions to *Creasman* interact with the statutory analogy. Dividing property in cohabitation cases is *less* predictable after *Lindsey* than before, while no additional equity has been accomplished.

B. How Analogous is Cohabitation to Community Property Marriage?

In considering whether *Lindsey's* "just and equitable" rule is appropriate, it is necessary to first consider the broad question of whether cohabitation is (or should be) analogous to community property marriage. This is the question that the *Lindsey* court's

47. See *Lindsey*, 101 Wash. 2d at 302, 678 P.2d at 331.

48. *Latham*, 87 Wash. 2d at 554, 554 P.2d at 1059; *Lindsey*, 101 Wash. 2d at 305, 678 P.2d at 331; *Connell*, 127 Wash. 2d at 346, 898 P.2d at 834.

analysis left untouched, and this is the question that will determine whether *Lindsey* is correct at all.

Society's thinking about cohabitation has changed—maybe even to the point where many are willing to *socially* put cohabitation on the same level as marriage. However, society's thinking on this issue has not changed to the point where Washington citizens are demanding legislative changes to *legally* put cohabitation and marriage on the same level. As *Lindsey*'s application suggests, too many problems exist with analogizing cohabitation to marriage in the law.⁴⁹ The court should not interject its view of whether cohabitation and marriage should be *legally* analogous. Until Washington citizens demand legislative changes, and until certain problems can be sufficiently addressed in this area, the law regarding distribution of cohabitational property should remain as it was pre-*Lindsey*, with the possible exception of allowing for the overrule of *Creasman*.⁵⁰

Whether cohabitation is analogous to marriage may be looked at from two partially overlapping perspectives, or spheres: the social sphere and legal sphere.⁵¹ This section first explores the social sphere—looking at some of the social norms affecting the desirability of analogizing cohabitation to community property marriage. Next, this section explores the legal sphere—seeing how these social norms interact with the process of legal decision making and examining whether, within the legal sphere, analogizing cohabitation to community property marriage is something our courts should do.

Today, cohabitation and marriage are often considered socially similar. Nary an eyebrow is raised when a social invitation requests that a guest bring his or her "significant other." However, over the years, various reasons have been advanced to favor the institution of

49. See *infra*, Part III.C., "Interpreting *Lindsey*: Cases Between *Lindsey* and *Connell*" (the scope of the analogy is unclear, and therefore unpredictable), and Part IV.C., "Beyond *Connell*" (discussing problems of identifying the types of relationships subject to statutory analogy, problems of when the relationship becomes subject to statutory analogy, and problems of differing expectations among cohabitants).

50. What would remain would be the *Creasman* exceptions.

51. My use of "social" and "legal" spheres was inspired by the idea of marriage as a "public" institution as expressed by Ellen Kandoian in COHABITATION, COMMON LAW MARRIAGE, AND THE POSSIBILITY OF A SHARED MORAL LIFE, 75 Geo. L.J. 1929 (1987). Kandoian describes marriage as both a "private" and a "public" institution. The private function of marriage defines the relationship between two people. The public function of marriage defines their relationship to the rest of society. *Id.*

This Comment does not consider Kandoian's idea of marriage as a private institution because I believe such consideration cannot yield any practical conclusion. However, the idea that the public function of marriage, and the analogy of cohabitation to marriage, has two further overlapping aspects of "social" and "legal" is the idea I wish to explore here.

marriage over cohabitational arrangements. First, marriage reflects our traditional view of family life. Second, marriage is considered necessary to legitimize the children born during a union; illegitimacy still carries a certain amount of social stigma. Third, marriage is an institution sanctioned and encouraged by religion, whereas most mainstream religions consider cohabitation to be sinful.

Contrary to these and other traditional reasons for placing marriage on a higher plane than cohabitation, society is now bombarded with anecdotal evidence telling us there is little or no social difference between marriage and cohabitation. Television and movie characters cohabit; celebrities cohabit; our friends, neighbors, and relatives cohabit. This anecdotal evidence enables us to put a face to those who cohabit and, therefore, we may conclude that cohabitating couples are not so different than married couples. It may have been easier to accept social mores against cohabitation when those mores were not often challenged—when cohabitation was considered something in which only the “lower class” engaged.⁵² Once the social mores against cohabitation were challenged and society did not come to an end, the traditional reasons for placing cohabitation on a level well below marriage may have lost relevance.

Be this as it may, if we are asked the question, “Why have marriage at all if cohabitation is easier, faster, and socially equal?” our answer may be the somewhat illogical response, “Marriage is valued and necessary because it just is.” Even though society rationally may see no distinction between marriage and cohabitation, deep down society craves something more formal, perhaps something more definable and more committed, than cohabitation.

Debates as to whether society is completely ready to treat marriage and cohabitation the same *socially* could continue for years without consensus. For the purposes of deciding whether *Lindsey's* statutory analogy is correct, looking at the social sphere is a rather fruitless exercise. However, the social sphere begins to overlap with the legal sphere when we examine the practical aspects of *Lindsey's* analogy and the process that is required to *legally* treat cohabitation the same as marriage.

Community property laws may be founded in part on the esteem society gives to the institution of marriage.⁵³ Cohabital relation-

52. See William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1679 (1984).

53. See, e.g., RICHARD A. BALLINGER, A.B., A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY ORGANICAL SYSTEM § 11, at 37-38 (1895).

ships can *never* be analogous to community property marriage because cohabitation is contradictory to the notion of community property itself.⁵⁴ Defenders of *Lindsey's* statutory analogy may claim that Washington has not adopted community property law for cohabitating couples, but has simply used those laws for guidance. In fact, the cases frequently point out that cohabitation is not marriage.⁵⁵ However, it is easy to lose sight of the idea that community property law cannot directly apply to cohabitation.

For example, *In re Marriage of Pearson-Maines*,⁵⁶ a case where the couple cohabitated before a brief marriage, the court fails to keep distinct the idea that there can be no community property prior to marriage. The case refers to community and separate property throughout, without quotation marks or any other indication that community property laws are used only by analogy. The *Pearson-Maines* court even says, "it is appropriate to review the *community* contributions and the transactions of the parties *prior* to their marriage in July of 1988."⁵⁷ In our judicial system that relies on the precedent of prior court opinions, it is easy to see how cases like *Pearson-Maines*

The principle which lies at the foundation of the whole [community property] system is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property; the theory of the law being, that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity and possessing an equal right to succeed to the property after its dissolution, in case one survives the other.

Id.

54. The proposition that cohabitation is contradictory to the notion of community property itself was argued in the dissent to the leading Nevada cohabitation case, *Western States Constr. Inc. v. Michoff*, 840 P.2d 1220, 1225 (Nev. 1992) (Springer, J., dissenting). Nevada has a "just and equitable" dissolution statute that is almost identical to WASH. REV. CODE § 26.09.080. The *Michoff* majority ultimately concluded that a cohabitating couple could impliedly contract to hold property as though it were community property, "in accord with the laws governing community property." *Id.* at 1224.

Justice Springer's razor-sharp dissent somewhat sarcastically coined the term "Mishoff Marriages." *Id.* at 1225. These "Mishoff Marriages," according to Justice Springer, conferred upon the cohabitating couple statutory rights of beneficial ownership of property in spite of the fact that no legal marriage existed. However, Justice Springer argued, "[i]t is the existence of marriage that informs the 'beneficial ownership' known as community property. Community property is marital property, and without marriage the term is meaningless." *Id.* at 1228-29.

Justice Springer also expressed concern that the majority opinion would have the effect of encouraging informal marriages by letting cohabitants create community property-like interests by agreement. *Id.* at 1225. Although Washington has not (yet) sanctioned the creation of community property-like interests by agreement, Justice Springer's concern about encouraging informal marriages is relevant in Washington as well.

55. *E.g., Connell*, 127 Wash. 2d at 348-49, 898 P.2d at 835.

56. 70 Wash. App. 860, 855 P.2d 1210 (1993).

57. *Id.* at 865, 855 P.2d at 1214 (emphasis added).

can contribute to the distortion of the idea that cohabitation is not marriage, much like a bad game of "telephone."⁵⁸

Only one thing may be considered certain: even though social attitudes about cohabitation have changed, within the legal sphere, cohabitation and marriage cannot be considered so equal as to permit the type of analogy in which the *Lindsey* court engaged. A nagging bit of traditionalism must still exist. The people of Washington have yet to demand the re-institution of common law marriage, the institution of "living together" statutes, or the revision of the community property statutes to include cohabitation as well as marriage. The *Lindsey* decision does not set forth any argument as to why the Washington Supreme Court is able to act in a way that makes cohabitational property analogous to community property.

C. Interpreting Lindsey: Cases Between Lindsey and Connell

This section will look at the cases between *Lindsey* and *Connell* in an attempt to find some guidance in interpreting *Lindsey's* just and equitable dictate. The only thing that can be gleaned from these cases is that Washington courts will not treat cohabitating couples like married couples based solely on the status of living together—there must be some sort of tangible contribution to the property claimed by the cohabitant. Although the fact that mere status will not produce property rights is interesting sociologically, this fact does little to remedy the problems of scope in interpreting *Lindsey*. From analysis of the cases between *Lindsey* and *Connell*, it is clear that the scope of *Lindsey* is still up in the air.

In the period between *Lindsey* and *Connell*, a total of ten Washington cases attempted to interpret and apply *Lindsey's* statutory analogy in various cohabitational situations.⁵⁹ Predictability seemed

58. "Telephone" is a child's game where the first child in a circle whispers a message into the ear of the second child, and then the second child repeats that message in the ear of the third child, and so on until the message comes full circle to the last child. Laughter then usually erupts when the last child announces the message, which usually bears little, or no, resemblance to the message the first child started around the circle.

59. *Peffley-Warner v. Bowen*, 113 Wash. 2d 243, 778 P.2d 1022 (1989); *Davis v. Employment Sec. Dep't*, 108 Wash. 2d 272, 737 P.2d 1262 (1987); *Zion Constr., Inc. v. Gilmore*, 78 Wash. App. 87, 895 P.2d 864 (1995); *Pearson-Maines*, 70 Wash. App. 860, 855 P.2d 1210; *In re Marriage of Hurd*, 69 Wash. App. 38, 848 P.2d 185 (1993); *Foster v. Thilges*, 61 Wash. App. 880, 812 P.2d 523 (1991); *In re Marriage of Shannon*, 55 Wash. App. 137, 777 P.2d 8 (1989); *In re Marriage of DeHollander*, 53 Wash. App. 695, 770 P.2d 638 (1989); *Western Community Bank v. Helmer*, 48 Wash. App. 694, 740 P.2d 359 (1987); *In re Marriage of Hilt*, 41 Wash. App. 434, 704 P.2d 672 (1985) (*Lindsey* was decided during pendency of appeal in this case. The court did not address *Lindsey* because the *Creasman* presumption had been rebutted by evidence of intent that the property be owned jointly.).

to be a key justification for *Lindsey's* overruling of *Creasman*. To have predictability, cohabitants and their attorneys need to acquire some idea as to the scope of the *Lindsey* analogy, both in extending the analogy to other marital statutes and as to which parts of the "just and equitable" dissolution statute apply by analogy.

The only perceivable trend since *Lindsey* is that Washington courts will not extend this analogy to other marital statutes when a cohabitant argues that he or she should be given the spousal status merely because he or she was a cohabitant. For instance, an appellate court refused to award attorney's fees to a cohabitant under RCW 26.09.140, which grants such fees to former spouses.⁶⁰ The Washington Supreme Court similarly refused to grant unemployment benefits to a woman who left employment to cohabit, although such benefits might have been available had she left her employment to marry.⁶¹ Also, the Washington Supreme Court refused to treat a surviving cohabitant the same as a surviving spouse under Washington intestacy statutes for the purpose of obtaining Social Security benefits.⁶²

Beyond this one identifiable rule in three of the ten cases, the remaining seven cases do not serve to illuminate the scope of *Lindsey*. Of those cases, two can be excluded from consideration because they did not fall under *Lindsey* at all.⁶³ The five remaining cases dealt with a cohabitant's claim of right to property grounded in more than the mere status of being a cohabitant. This type of claim occurs when a cohabitant tangibly contributes, either with money or labor, to the purchase or improvement of property during the cohabitation.

The first of these five cases was *In re Marriage of DeHollander*. The Court of Appeals, Division 3, affirmed the treatment of real estate purchased by a cohabitant with his separate funds during the cohabitational relationship like community property where the couple later married.⁶⁴ Next, in *Foster v. Thilges*, Division 1 ruled that real estate purchased during a ten-year cohabitational relationship became just like community property, affirming the trial court's use of the "just and equitable" dissolution statute to divide the property.⁶⁵ Just two years

60. *Helmer*, 48 Wash. App. at 699, 740 P.2d at 362.

61. *Davis*, 108 Wash. 2d at 278, 737 P.2d at 1266.

62. *Peffley-Warner*, 113 Wash. 2d at 252, 778 P.2d at 1027.

63. *Hilt*, 41 Wash. App. 434, 704 P.2d 672 (*Lindsey* was decided while *Hilt* was pending appeal); *Shannon*, 55 Wash. App. 137, 777 P.2d 8 (the relationship was not considered a long-term, stable, nonmarital relationship).

64. *DeHollander*, 53 Wash. App. at 701, 770 P.2d at 641.

65. *Foster*, 61 Wash. App. at 886, 812 P.2d at 526-27.

later, in *In re Marriage of Hurd*, Division 1 held in a dissolution action where the marriage had been preceded by a short period of cohabitation, that the mere fact that property was purchased during cohabitation did not transform separate property into community property.⁶⁶ In the same year as *Hurd*, the same court decided *In re Marriage of Pearson-Maines*.⁶⁷ *Pearson-Maines* held that a residence acquired by a woman prior to cohabitation and marriage remained her "separate" property; any "community" improvements to the residence would first be offset by the benefit the "community" received from using the property and would then be a right of reimbursement in the "community."⁶⁸ The last case regarding the disposition of property accumulations of a cohabitating couple decided prior to the *Connell* Supreme Court case was *Zion Construction, Inc. v. Gilmore*;⁶⁹ there, the appellate court concluded that where the property was purchased with one cohabitant's assets, but title was placed in both names and payments were made from both salaries, it was like community property according to *Lindsey*.⁷⁰ However, the *Zion* court went on to find that the characterization of the property did not matter because the court had the power to make a just and equitable distribution and use its wide discretion to determine what this meant.⁷¹

Other than the courts' refusals to allow statutory analogy based purely on status, the cases between *Lindsey* and *Connell* are probably insufficient to show the scope of *Lindsey*. One interesting note, however, is that it appears that the courts, by limiting statutory analogy to those cases where a remedy would be available through the *Creasman* exceptions, may in fact be applying equity, then placing a statutory fig leaf over that equity. This idea calls into question the benefit of *Lindsey*'s statutory analogy. Because we may feel that marriage and cohabitation are socially the same, we may not approve of treating them differently in the legal context. It seems impersonal to use the same equitable remedies for cohabitants as used for business partners, fiduciaries, or contracting parties. But if the courts are using marital statutory analogy to bring legal doctrine in line with modern social norms, this effort is misplaced. Statutory analogy compromises legal predictability while gaining nothing in fairness over the older, equity-based *Creasman* exceptions.

66. *Hurd*, 69 Wash. App. at 54, 848 P.2d at 195.

67. *Pearson-Maines*, 70 Wash. App. 860, 855 P.2d 1210.

68. *Id.* at 870, 855 P.2d at 1216.

69. *Zion*, 78 Wash. App. 87, 895 P.2d 864.

70. *Id.* at 89, 895 P.2d at 866-67.

71. *Id.* at 92-93, 895 P.2d at 867. ◊

IV. CONNELL AND BEYOND

The Washington Supreme Court's most recent decision on this issue, *Connell v. Francisco*,⁷² demonstrates the inherent uncertainty in the scope of *Lindsey*'s statutory analogy. While *Lindsey*'s goals of equity and predictability are admirable, neither *Lindsey* nor *Connell* does anything to promote those goals. *Connell* shows that *Lindsey* has left the door wide open for judicial interpretation—judicial interpretation that will lead to unpredictability and a corresponding loss of equity for cohabitating parties. This Part first summarizes *Connell*, including: (1) the facts of *Connell*, (2) the appellate court's holding, (3) the Washington State Supreme Court's holding, and (4) the current state of the law after *Connell*. Then this Part measures *Connell*'s version of statutory analogy against *Lindsey*'s goals, concluding that *Connell*'s interpretation of *Lindsey* does nothing to make decisions more predictable or equitable in this area of the law. Finally, this Part hypothesizes as to where *Connell*'s version of statutory analogy could lead, and concludes that the door has been left wide open to completely analogize cohabitation to marriage.

A. *Connell v. Francisco*

In 1995, the Washington State Supreme Court authoritatively rejected appellate courts' interpretation of *Lindsey* that the court was to look at *all* of the property of the parties (both "separate" and "community") to make a just and equitable distribution.⁷³ Instead, *Connell* held that *only* the property that would have been community property had the parties been married would be before the court for a just and equitable distribution.⁷⁴

1. Facts of the *Connell* Case

Shannon Connell was a dancer in a stage show produced by Richard Francisco. In 1983, Shannon moved to Las Vegas to live with Richard. At that time, Shannon owned her clothing, her car, and a leasehold interest in a New York apartment. Richard was substantially better off financially, with net worth of approximately \$1,300,000. His assets included several companies, two of which, Prince Productions, Inc. and Las Vegas Talent, Ltd., produced stage shows for hotels. During the time the couple lived in Las Vegas, Shannon worked as a

72. 127 Wash. 2d 339, 898 P.2d 831.

73. *Id.* at 349, 898 P.2d at 835.

74. *Id.*

paid dancer in several stage shows. She also assisted Richard with his businesses. Richard managed his companies and produced several profitable stage shows.⁷⁵

In 1985, Prince Productions purchased a bed and breakfast in Washington, known as the Whidbey Inn. Shannon moved to Whidbey Island to manage the Inn. Soon Richard joined her. For two years Shannon managed the Inn without compensation. For one year she received a salary of \$400 per week. Meanwhile, Richard produced another profitable stage show and purchased several tracts of real property. Shannon did not contribute financially to the purchase of any of this property and title was either in Richard's name, or in the name of Prince Productions.⁷⁶

In 1990, the seven-year relationship ended. While Shannon's assets had only increased slightly during the relationship, Richard's net worth had more than doubled to \$2,700,000. Shannon filed a lawsuit seeking a just and equitable distribution of the property that was acquired during their cohabitation. The trial court limited the property subject to distribution to that which would have been community property had the parties been married. The court held that the property owned by each party prior to the relationship could not be distributed. The trial court then required Shannon to prove by a preponderance of the evidence that the property acquired during their relationship would have been community property had the two married. As a result, the only property characterized by the trial court as "community" property was the increased value of Richard's pension plan, half of which was distributed to Shannon. The trial court concluded that Shannon had not met her burden of proof with respect to the remaining property.⁷⁷

2. *Connell* Appellate Court Decision

The court of appeals reversed the trial court's holding that only property acquired during the relationship that would have been community in character had the parties been married was subject to a just and equitable distribution, and held that the "separate" property could be distributed as well. Further, the *Connell* appellate court asserted that any analogy to the "just and equitable" dissolution statute

75. *Id.* at 343-46, 898 P.2d at 832-34.

76. *Id.* at 345.

77. *Id.* at 345, 898 P.2d at 834.

should include the statute's "flexible guidelines"⁷⁸ to take into account all of the circumstances in each case in order to provide equity. That meant having all the property on the table, mirroring the requirement of RCW 26.09.080 in dissolution actions.⁷⁹ The *Connell* appellate decision may be characterized as the "high-water mark" of interpreting *Lindsey*. Although the *Connell* appellate decision was soon partially reversed by the Washington Supreme Court, it demonstrated the extent to which the *Lindsey* statutory analogy may be taken.

The *Connell* appellate court further discussed the application of the community property presumption to assist in characterizing the cohabitants' property as "separate" or "community." As applied to marriages, the community property presumption provides that all property acquired during marriage is presumed to be community property unless rebutted by proof that it is the separate property of a spouse.⁸⁰ The *Connell* appellate court acknowledged that the question of whether the community property presumption applied had never been directly decided, but concluded "that the presumption cannot rationally be severed from the obligation to divide property justly and equitably by analogy according to the principles of RCW 26.09.080. In large measure, application of RCW 26.09.080 in the meretricious relationship context would be meaningless without the presumption."⁸¹ This portion of the appellate court's opinion was affirmed by the Washington Supreme Court, and has now become an off-shoot rule to *Lindsey*.

3. *Connell* Supreme Court Decision

Richard petitioned the Washington Supreme Court for discretionary review. The issue before the Supreme Court was whether the appellate court erred by imposing a community property-like presumption to all property. A subissue was to what extent the "just and equitable" dissolution statute governed the disposition of property after a cohabitational relationship.

78. It is assumed that by "flexible guidelines" the *Connell* appellate court was referring to the ability of a trial court in a dissolution action to look at all of the property (separate and community), consider the future financial circumstances of the parties (including future earning potential), and make an equitable distribution. This would include the trial court's ability to award a spouse one community property asset while offsetting this award with an award to the other spouse of another community property asset, or a mix of community and separate assets.

79. *Connell*, 74 Wash. App. at 316, 872 P.2d at 1156-57.

80. WASH. REV. CODE § 26.16.030; see, e.g., *Yesler v. Hochstetler*, 4 Wash. 349, 30 P. 398 (1892); *In re Marriage of Martin*, 32 Wash. App. 92, 645 P.2d 1148 (1982).

81. *Connell*, 74 Wash. App. at 318, 872 P.2d at 1157.

The Washington Supreme Court found that the appellate court erred in imposing a community property-like presumption to all property.⁸² The court stated that a cohabitational relationship was not the same as a marriage.⁸³ The laws involving distribution of marital property therefore did not directly apply to the division of property following cohabitational relationships, but courts could look toward those laws for guidance.⁸⁴ The court characterized the *Lindsey* rule as a general rule requiring a just and equitable distribution of property following a cohabitational relationship.⁸⁵

The court next stated that portions, not all, of the "just and equitable" dissolution statute may apply by analogy. Only property acquired during the relationship should be before the trial court.⁸⁶ The court further emphasized that there could only be community property when there was a marriage; "[h]owever, only by treating the property acquired in a meretricious relationship similarly can this court's reversal of 'the *Creasman* presumption' be given effect."⁸⁷ The court feared that failure to apply a community property-like presumption to the property acquired during the cohabitational relationship would place on the nonacquiring partner the burden of proving that the property would have been community property had the couple been married.⁸⁸ This would overrule *Lindsey* and thus reinstate *Creasman*.

4. Post-*Connell* State of the Law in Washington

After *Connell*, Washington law regarding property distributions after cohabitational relationship is summarized as follows: There is now a rebuttable community property-like presumption that applies to all property acquired during the cohabitational relationship. This "community" property comes before the court for a just and equitable distribution. The presumption operates regardless of the state of the title. Further, the definitions in RCW 26.16.010-.030 of "separate" and "community" can be applied by analogy.⁸⁹ Also, where the funds or services owned by both parties are used to increase "separate" property equity or to maintain or increase the value of the other's

82. *Connell*, 127 Wash. 2d at 352, 898 P.2d at 837.

83. *Id.* at 348, 898 P.2d at 835.

84. *Id.* at 349, 898 P.2d at 835.

85. *Id.* at 347, 898 P.2d at 834-35.

86. *Id.* at 349, 898 P.2d at 836.

87. *Id.* at 350, 898 P.2d at 836.

88. *Id.*

89. *Id.* at 351-52, 898 P.2d at 836-37.

"separate" property, there may arise a right of reimbursement in the "community." A court may, however, offset the "community's" right of reimbursement against any reciprocal benefit received by the "community" for its use and enjoyment of the individually owned property.⁹⁰

B. *Lindsey's Statutory Analogy a'la Connell*

Given *Lindsey's* express goals that distribution of property after cohabitational relationships produce equity and lead to predictability, the next point for analysis is whether *Connell's* version of statutory analogy fulfills these two goals.

Connell's version of *Lindsey's* "just and equitable" statutory analogy is not an improvement for three reasons. First, *Connell* analogizes to the "just and equitable" dissolution statute, but then fails to use all of the governing principles of the statute, resulting in confusion and a loss of any equity sought by the analogy. Second, *Connell*, like *Lindsey*, fails to instruct how the "just and equitable" dissolution statute should be applied, therefore leaving the door open to further judicial interpretation. Third, *Connell* fails to adequately justify the adoption of a community property-like presumption and the use of other community property statutes. *Connell* does not give future litigants or courts guidance on how to handle the practical difficulties of applying community property statutes. In sum, *Connell's* version of *Lindsey* adds to the unpredictability of distributions of cohabitational property while adding nothing to improve equity.

Connell applied *Lindsey* in two new ways: (1) it limited the analogy to the "just and equitable" dissolution statute to the property that would have been community property had the couple been married, and (2) it adopted a community property-like presumption that all property acquired during the cohabitational relationship was "community" property. In furtherance of the community property-like presumption, the *Connell* court called for the use of the community property statutes (RCW 26.16.010-.030) to define "separate" and "community," and allowed a right of reimbursement in the "community" for the increase in value of "separate" property assets during the relationship.⁹¹ When these two interpretations are put up against *Lindsey's* goals of equity and predictability, it becomes apparent that *Connell's* version of statutory analogy does not satisfy *Lindsey*.

90. *Id.*

91. *Connell*, 127 Wash. 2d at 351, 898 P.2d at 836-37.

1. Limiting the Analogy to "Community" Property

Connell's limitation of the "just and equitable" analogy to that property that would have been "community" property had the couple been married does not meet *Lindsey's* goal of predictability.

Justice Utter's dissent in *Connell* illustrates the initial arguments against *Connell's* partial-analogy rule.⁹² Justice Utter believed that this rule would lead to uncertain application and would in fact interfere with the *Lindsey* requirement of a just and equitable distribution.⁹³ Advocating for a "simple rule" that would be easy to apply, Justice Utter supported the *Connell* appellate court's interpretation of *Lindsey*, which required that *all* property was to be before the court.⁹⁴ This basic argument was that if a court is going to analogize to a statute, it should analogize to all of it, not just a portion.

Justice Utter agreed with the majority that *Lindsey* did not interpret the "just and equitable" dissolution statute to *include* cohabitational relationships; however, Justice Utter viewed *Lindsey* as adopting a common law rule applicable to cohabitants which *mirrored* the provisions of the statute.⁹⁵ Justice Utter argued that the "*cf.*" signal preceding the *Lindsey* court's citation to the "just and equitable" dissolution statute is consistent with his and the *Connell* appellate court's view that *all* property be subject to a just and equitable distribution. He posited that although the type of relationship (cohabitation) is different than marriage, the governing principles of the "just and equitable" dissolution statute should be the same. However, if neither the type of relationship nor the governing principles were the same, Justice Utter argued, the "just and equitable" dissolution statute would not be "sufficiently analogous to lend support," and that the *Lindsey* holding would be unfounded.⁹⁶

Justice Utter did not explicitly state what may be logically inferred as the next step in his thought process: because *Lindsey* is not unfounded, the "just and equitable" dissolution statute's governing principles apply to cohabitational relationships in the same manner as they apply to marriage. However, it is asking a lot to assume that *Lindsey* is not unfounded. It has already been shown above that the *Lindsey* court was not founded in basing its holding on the need to

92. *Id.* at 353, 898 P.2d at 837-38 (Utter J., dissenting).

93. *Id.* at 353, 898 P.2d at 837 (Utter J., dissenting).

94. *Id.*

95. *Id.* at 353, 898 P.2d at 838 (Utter J., dissenting).

96. *Id.* at 354, 898 P.2d at 838 (Utter J., dissenting).

overrule *Creasman*. Why should it be granted that the *Lindsey* court was on solid ground when it used the "cf." signal to adopt RCW 26.09.080 by analogy? It would seem that if the foundation were firm, the *Lindsey* court would have been more explicit as to how the "just and equitable" dissolution statute should be applied.

2. Community Property-Like Presumption

The *Connell* court also fails to adequately justify why it was appropriate to adopt the community property-like presumption, use RCW 26.16.010-.030 for the definitions of "separate" and "community," and allow a right of reimbursement in the "community" for the increase in value of "separate" property assets during the relationship. These are not rules specifically authorized by *Lindsey*. The *Connell* court's only justification is that without a community property-like presumption, the *Lindsey* court's overruling of the *Creasman* presumption would have no effect and place the burden of proof on the nonacquiring partner.⁹⁷ This proposition makes no sense without adopting some of the fundamental tenets of community property: that when two people are legally married they form a partnership called the marital community, that the interest of the marital community is presumed to be more important than the individual interests of the community members, and that the spouse asserting his or her individual property interests over the interests of the community bears the burden of proving why that interest should be sustained over the community's interest.⁹⁸ For cohabitating couples, an essential ingredient fundamental to community property is missing: *legal marriage*.

Because legal marriage is the one element required for a community property relationship,⁹⁹ any analogy to a community property-like presumption in cohabitational relationships lacks foundation. As discussed in Part III, the value placed on marriage by our society is at the base of our community property statutes, so much so that we are willing to accept a certain amount of inequity to third parties dealing with a married couple. This is not true for cohabitation. Because the fundamental bases of marriage and cohabitation differ, the two are not analogous. Additionally, the practical difficulties of analogizing cohabitation with a marriage (including determining exactly when to

97. *Id.* at 350, 898 P.2d at 836.

98. See WASHINGTON STATE BAR ASS'N, WASHINGTON COMMUNITY PROPERTY DESKBOOK § 3.13 (2d ed. 1989).

99. *Id.* § 1.10.

begin the analogy, determining if the analogy is retroactive once it is established, and determining which situations merit analogy) present an additional layer of unpredictability to the already inherently unpredictable legal state of cohabitation.

Even if the *Lindsey* court's holding had been well intended, *Connell* demonstrates that statutory analogy makes the law surrounding property disposition after cohabitation more unpredictable. It has already been demonstrated that the courts will decline to interpret *Lindsey*'s analogy as meaning that cohabitation is, in effect, the same as marriage (e.g., attorney's fees in dissolution actions, unemployment benefits for leaving a job to get married, or intestate devolution). However, *Connell* demonstrates that Washington courts will willingly extend some aspects of *Lindsey*'s statutory analogy to treat cohabitation the same as marriage, including community property-like presumptions, statutory definitions for "community" and "separate," and the right of reimbursement in the "community." So the question becomes: Why is it appropriate to treat unmarried cohabitants the same as if they were married for property distribution on dissolution, and inappropriate to treat them as married for other purposes? The only answer to this apparent contradiction is that the Washington Supreme Court is attempting, albeit in an ad hoc manner, to correct the wrongs that have been done to cohabitants seeking property distributions.

This effort, most recently evident in *Connell*, has caused more difficulties than it has solved. One of the primary purposes of *Lindsey*, making the law respecting property dispositions at the end of cohabitational relationships more predictable, has not been fulfilled by *Connell*. In fact, *Connell*, and the cases preceding it, demonstrate a decided lack of predictability in defining the *Lindsey* rules. It is also arguable that the Washington Supreme Court has attempted to provide cohabitating couples with equitable treatment. But by adding another layer of analysis to the already existing equitable doctrines, the Court has instead increased the inherent unpredictability of cohabitation. This added unpredictability reduces effective planning for cohabitating couples and requires that each situation be looked at anew by the courts. Litigation is expensive and time consuming, and brings with it emotional costs.

C. Beyond Connell

What comes after *Connell* regarding property distributions after cohabitation should be scrutinized to determine whether analogy to the marriage statutes is practical or compatible with public policy. A critical look at possible future decisions under *Connell* leads to the

conclusion that if the court continues on its present course, the goals of *Lindsey* will not be served. The rationale for this conclusion falls into two general categories: (1) it is not practical to continue the analogy to the marriage statutes, and (2) public policy favoring marriage requires that there be a distinction between the treatment of marriage and the treatment of cohabitation.

1. Practical Considerations

The practical effect of *Connell* is that it will lead to less predictability. For instance, there is no clear moment when a relationship becomes a "stable, continuous, family-type relationship" which will be subject to the community property-like presumptions. The test for determining this point has changed with case law. Prior to *Lindsey* there was some indication that the length of the relationship would be the critical factor. However, the cohabitation in *Lindsey* was only two years prior to marriage; the *Lindsey* court seemed to discount the time factor considerably. It may be that the court thought it was significant that the couple later married. This leads to the conclusion that later marriage is a factor to be considered favorably in determining if the relationship is a "stable, continuous, family-type relationship."

Not only is it very difficult to determine the exact point at which the courts will apply the marriage statutes by analogy, but it is also unclear whether, and on what basis, the marriage analogy will be applied retroactively to the beginning of the relationship. It would seem that cohabitational relationships sometimes do not start at a certain date. For example, a couple may maintain separate residences and stay portions of the week at one residence or the other. It would seem from *Lindsey* that if this couple later married, it is possible for a court to retroactively treat them as cohabitating under *Connell's* version of marital analogy.

This same hypothetical couple may not get married at all, but sustain this relationship for many years. Whether a relationship is terminated by death or dissolution may also be a critical factor. Perhaps the parties view themselves as having a "stable, continuous family-type relationship," but each cohabitant has a different view about when this relationship began. The possible hypothetical situations are many, and the solutions will have to be looked at on a case-by-case basis.

A court evaluating such a situation under *Connell* would have to engage in the following analysis. The first step would be for the court to evaluate the relationship to determine if it was a "stable, continuous, family-type relationship." If it was, then the court would apply the

Connell rules. Property acquired during the relationship is presumably "community," and the court could use RCW 26.16.010-.030 to determine the definitions of "separate" and "community." Then the court would make a "just and equitable" distribution of that "community" property.

However, suppose that the cohabitating couple participated in a business together, titled all of the property in the woman's name in order to avoid an increase in the man's child support payments to a former spouse, or incurred a tort liability to a third party during the cohabitation. Further, suppose the relationship lasted over fifteen years and the woman, who contributed to the success of the relationship as a "housewife," is unable to support herself and requires spousal support while gaining job training. All of these issues require something more than *Connell's* statutory analogy in order to have equity.

The situations involving cohabitants are unpredictable by nature. Unfortunately, there is little that can be done to remedy this, short of legislation adopting common law marriage or a cohabitation statute. Washington courts have already found instances where they will not allow a marital statutory analogy. Cohabitants cannot count on being treated as married couples in all instances.

Finally, it must be considered that because cohabitants may reasonably expect their particular situations to be viewed favorably by a court, there will be a flood of these sorts of cases, thus increasing the risk of inconsistent decisions by lower courts. Unfortunately, *Connell* will offer no clear guidance and the danger may become that the Washington Supreme Court, in trying to justify *Connell's* existence, will do more harm than equity.

2. General Public Policy Considerations

Aside from the practical considerations discussed above, one cannot ignore general public policy considerations, that is, how we feel as a society about treating cohabitation similarly to marriage. Because these considerations were discussed above in Part III, they will merely be summarized briefly here as a reminder.

First, the foundational idea that Washington's community property law requires marriage demonstrates that the *Lindsey* and *Connell* statutory analogies are completely unfounded. Cohabital relationships are not analogous to community property marriage because cohabitation is contradictory to the notion underlying Washington's community property statute itself. Second, we do not hold cohabitation in the same esteem as we hold marriage. Finally, it

is contrary to our system of government to allow courts to decide whether cohabitation should be analogous to marriage. This is a social normative determination that is more properly made through the political system.

V. CONCLUSION: SEEING THE ANSWER THAT IS RIGHT BEFORE US

Hopefully, this Comment has persuaded the reader that the *Creasman* presumption was somewhat ineffectual in the field of property distributions after cohabitation. Unfortunately, the *Creasman* presumption was very effectual in one way: It became so normatively distasteful that it served as a battle cry to lead the court down its current path of statutory analogy. However, if it is not a good idea to perpetuate the statutory analogy that *Lindsey* began and *Connell* furthered, we are still left with the unanswered question of how cohabitational relationships should be treated by the courts.

Because of the varied nature of cohabitational relationships, there is no one answer to that question. The most flexible solution is for the courts to use the concepts of equity within the confines of the existing equitable doctrines, which have been applied as the exceptions to the *Creasman* presumption. If the *Creasman* presumption is disregarded, and if the cases in the *Creasman* era are examined based on how they were actually decided, it is possible to conclude that equity already existed, and that statutory analogy was (and is) unnecessary.

In each case where a *Creasman* exception was used to provide an equitable solution for the cohabitants, the cohabitation situation differed factually, just as situations between noncohabitating people would differ. Applying the *Creasman* exceptions worked because the parties and the courts drew upon a large body of law and fit that law to the particular facts of each cohabitation. Although predictability would not be absolute, using the equitable doctrines provides more predictability than statutory analogy. As discussed above, predictability is inhibited in a statutory analogy approach because the scope of the analogy is not clear. Conversely, the scope of the equitable doctrines is relatively clear, and it usually is a matter of deciding which doctrine fits the factual situation.

Further, using the equitable doctrines does not intrude on the legal relationship of marriage. No special relationship is necessary for the equitable doctrines to apply. For some, the idea that the cohabitational relationship would not be specially valued is a problem. These people do not like using the same doctrines that are commonly used in business; to them, cohabitation is a personal relationship, whereas

business relationships imply coldness, money, and calculation. The response to this complaint is that it is better to sacrifice a bit of normative comfort than to sacrifice flexibility and predictability by wedging cohabitation into an ill-fitting statutory analogy.